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COMPARATIVE AIR LAW

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Aviation is a comparatively new means of transportation, the law of the air is scarcely a half a century old and the most definitive progress in that field has been made in the last decade. The law of aviation is interrelated with other branches of law, for the rights and duties of flight in private air law are closely connected with civil, military, admiralty, federal and international activities. Nevertheless, aviation law occupies a field of its own because aircraft operate in a different medium than any other agency of transportation and, consequently, require new rules to define their activities.¹

UNITED KINGDOM

English law of the air has its basis in common law and incorporation of national law and doctrines of admiralty law.

Specific aviation legislation has, of course, been enacted. The Air Navigation Act of 1919² gave to His Majesty in Council the power to control and to make regulations for aerial navigation over the British Isles and adjacent territorial waters and to administer all matters relating to civil aviation. The Air Navigation Act of 1920³ repeals all previous air navigation acts and gave to His Majesty in Council the power to give effect to the Convention of Paris and to control all aerial navigation in the British Isles. The 1932 Carriage of Goods by Air Act⁴ gave effect in English national law to the Convention of

¹ "... the resemblances to water, rail and motor traffic must not blind us to the fact that legally, as well as literally, air commerce . . . has soared into a different realm than any that has gone before. . . ." U.S.S.C. in *Chicago and Southern Air Lines v. Waterman S.S. Corporation*. 68 S.Ct. 431 (1948).

² Air Navigation Act of 1919. 9 & 10 Geo. V, C. 3.

³ Air Navigation Act of 1920. 10 & 11 Geo. V, C. 80

⁴ Carriage of Goods by Air Act, 1932. 22 & 23 Geo. V, C. 36.

International agreements were given effect in the colonies by:

Convention of Paris, 1919:

Australia: Carriage by Air Act, 1935.

Ireland: Air Navigation and Transport Act, 1931.

Canada: Aeronautics Act, 1919.

India: Indian Aircraft Act, 1934.

New Zealand: Air Navigation Act, 1931.

Union of South Africa: Aviation Act, 1923.

Convention of Warsaw, 1929:

Australia: Carriage by Air Act, 1935.

Ireland: Air Navigation and Transport Act, 1936.

India: Indian Carriage by Air Act, 1934.

New Zealand: Carriage by Air Act, 1940.

Warsaw of 12 October, 1929. The Air Navigation Act of 1936⁵ removed from the Air Council the authority to acquire land "by purchase or hire" and gave to the Secretary of State the power to acquire land for civil aviation purposes, co-extensive with the power of acquiring land for military purposes. That Act also gave broad authority to the proprietor of an airport with regard to regulation of the safety factors of aircraft flying in the vicinity of an airport. The British Overseas Airways Act of 1939⁶ provided for a far-reaching reorganization of British air transport by the dissolution of Imperial Airways and British Airways and the incorporation of British Overseas Airways Corporation, with provision for subsidy payments by the government to the Corporation. The BOAC board, appointed by the Secretary of State, is charged "to secure the fullest development consistent with economy of efficient overseas air transport services, to be operated at a reasonable charge." (The successful development of BOAC has led to recurring consideration of the utility of a single American air carrier as a "chosen instrument.")

The statutory law has superseded the common law of England in the imposition of liability on owner or operator of aircraft. The Act of 1920 followed the "reasonable use" theory for determination of liability in:

"No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with."

—10 & 11 Geo. V, c. 80 §9(1)

The subsequent Act of 1936, in amending the Act of 1920, follows the same theory in forbidding action of trespass or nuisance for flight of aircraft at reasonable heights over property, provided there is compliance with statutes and regulations. Prior to the passage of the 1936 Act, an English aircraft owner could escape liability by insolvency or bankruptcy. However, Part II of the 1936 Act provided for a plan of limited liability, coupled with compulsory deposit of cash, surety bonds or liability insurance. No one may fly in England, under penalty of fine and imprisonment, without depositing with the High Court a

⁵ Air Navigation Act of 1936. 22 & 23 Geo. V, C. 36; 1 Ed. VIII, C. 44. Orders in Council made under the act apply in the United Kingdom, including Scotland and Northern Ireland, although in the case of the latter, certain special provisions may be made by His Majesty in Council. They do not apply in British Dominions of Canada, Australia, New Zealand, Union of South Africa, Newfoundland, India, the Irish Free State. Acts and Orders, as appropriate, apply in the British colonies, protectorates and mandated territories, the Islands of Jersey and Guernsey and the Isle of Man.

⁶ British Overseas Airways Act of 1939. 2 & 3 Geo. VI, C. 61, 4 August, 1939.

fixed sum for his airplane.⁷ This provision may be somewhat burdensome to individual owners of private English aircraft, as considerable sums of money are tied up as a pledge to the general public that crash damage will be paid for, but it also gives greater assurance for recovery to an injured party. The obligation is also at substantial variance with the liability imposed on an airplane owner in civil law countries, as will be discussed later.

There is no difficulty in predicting that weight in aircraft, released by accident, design or mid-air collision will fall to the ground, but the legal consequences of such gravitational phenomena are not always so easily predictable, in view of the varying national laws of different countries. English law prohibits the dropping of ballast, other than fine sand or water, from aircraft in the air.⁸ (Presumably the jettison of cargo in emergency to save the aircraft would be specially considered; the landing of persons by parachute is not expressly prohibited.⁹) In England, prior to the 1920 Air Navigation Act, the aircraft owner's liability varied according to the situation of the parties and proof that damages were caused by his fault. Few surface damage cases were litigated in Britain prior to 1920, but assumedly they would have been governed by Coke's famous maxim of *cujus est solum*¹⁰ and Lord Ellenborough's remark.¹¹ Since the 1920 Act, the British aircraft owner has

⁷ Air Navigation Act of 1936, Part II, Sec. 15-22 provides limited liability coupled with compulsory deposits of cash, bonds or insurance. No one shall fly civilly in Great Britain on pain of £200 fine and six months in jail unless he deposits with the Clerk of the High Court a sum between £10,000 for a small airplane and £500,000 for two or more large airplanes (one pound sterling per pound avoirdupois of loaded aircraft) or furnish substantial surety or provide insurance, so that injured parties may have recourse under the Third Parties' (Rights against Insurers) Act of 1930. The Irish Free State's Air Navigation Act closely resembles this provision. Such is a practical step toward effecting a plan like the International Convention on the Aircraft Liability to Third Parties on the Surface, Rome, 1933.

⁸ Air Navigation Order, 1923, Section VII.

⁹ AIR LAW. C. N. Shawcross and K. M. Beaumont. Butterworth & Co. 1945. Section 137(u).

¹⁰ *Cujus est solum ejus est usque ad coelum et ad inferos*. The phrase was supposedly adopted by Lord Coke from an obscure glossator on Justinian's *Digest of Roman Law* and restated by Blackstone in his *Commentaries*.

See Charles S. Rhyne, AIRPORTS AND THE COURTS, 1944. Washington, page 95. Coke on Littleton, Lib. I, Sec. 1, p. 4; Eugene Sauze in *Les Questions de Responsabilité en Matière d'Aviation* (Paris, 1916) p. 24, traces the maxim to Franciscus Accursius of Bologna (circa 1200). The maxim is the basis of Article 22 of the Civil Code of Napoleon. Henri Guibe, *Essai sur la Navigation Aérienne en Droit Interne et en Droit Internationale* (Paris, 1912) p. 35. Lychlana A. Nijeholt in *Air Sovereignty* (The Hague, 1910) p. 35 states that the same provision is found in the legal codes of Belgium, Germany, Italy, Switzerland, Netherlands, Spain, Portugal, Austria, Japan and Turkey. See also, John C. Cooper. *Roman Law and the maxim 'Cujus est Solum' in International Air Law*. Montreal, Institute of International Air Law, McGill University, 1952. Publication No. 1.

¹¹ *Pickering v. Rudd*. 4 Camp. 219; 1 Starkie 56. Nisi Prius (1815): "Nay, if this board overhanging plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass." See, also, Lord Blackburn in *Kenyon v. Hart*, 122 Eng. Rep. 118 (1865).

been liable for damages caused to persons or property on the ground.¹² Such presumption of liability against the owner is probably a combination of *res ipsa loquitur*¹³ and the *Rylands v. Fletcher*¹⁴ doctrine.

Other statutory provisions in English law may be noted briefly. If a foreign aircraft in the course of passage through or over England is alleged to be infringing any Patent, Design or Model entitled to protection in England, that aircraft may be detained by Order of the Court until the owner deposits security in regard to the alleged infringement and on deposit, the aircraft is free from further detention. Foreign aircraft in England (pending ratification by His Majesty's Government of the 1933 Rome Convention) is susceptible of seizure in the execution of civil process and liens, to the same extent as other English chattels in execution of judgment.¹⁵ Every aircraft maneuvering under its own power on the water shall conform to the Regulations for Preventing Collisions at Sea, with regard to lights, passing and the like.¹⁶ With regard to wreck and salvage, all services rendered in saving of life from aircraft, on or over the sea, are, in English law, salvage services in cases in which they would have been salvage services if given to a vessel; this also applies to services for the aircraft's cargo or apparel, and actor is entitled to the same reward for those services as if the aircraft had been a vessel.¹⁷

From the time of Queen Elizabeth I, an English carrier has been an insurer of the safe arrival of goods, subject to the defenses of act of God, force majeure, King's enemies, inherent vice of the goods, or fault

¹² Air Navigation Act of 1920. 10 & 11 Geo. V, C. 80 §9(1). "No action shall lie in respect of trespasser in respect of nuisance . . . but where material damages or loss is caused by an aircraft in flight, taking off or landing or by any person in any such aircraft, or by any article or person falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damages or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered."

¹³ The *res ipsa loquitur* doctrine removes the onus of proof from the injured party to the person causing the injury, on the basis that an accident was extremely unlikely had there been no negligence.

¹⁴ The *Rylands v. Fletcher* doctrine considers that any person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, he is *prima facie* liable for all the damage that is the natural consequence of its escape. *Vis major* or act of God alone excuse him. 1866, L.R. 1; Ex. 265; 1868, L.R. 3 H.L. 330.

¹⁵ *Supra*, 9, Shawcross §521(a).

¹⁶ *Supra*, 9, Shawcross §1391.

¹⁷ Merchant Shipping Act of 1894, Part IX, as amended, includes aircraft in the terms "vessel, ship, wreck" and includes aircraft or cargo thereof found derelict in the seas surrounding Great Britain. The Prize Act of 1939 (2 & 3 Geo. VI, c. 65) provides that the law relating to prize shall apply in relation to aircraft and goods carried therein as it applies to ships and goods carried therein, applying notwithstanding that the aircraft is on or over land, and provides that the Naval Prize Act of 1864 (27 & 28 Vict, c. 25) shall not apply in relation to aircraft or goods carried therein taken as prize. The 1939 Prize Act extends to Great Britain, the Channel Island, the Isle of Man, Commonwealth of Australia, Dominion of New Zealand, British India, British Burma, Newfoundland and every colony and British protectorate.

of the shipper-passenger.¹⁸ Presently in England, the liability of international air carriers is governed by the Warsaw Convention and any provision fixing a lower liability limit than that of the Convention is null and void, although the rest of the contract may remain valid. By the Warsaw Convention, an international air carrier is not liable for damages on proof that he did everything possible to avoid damages, that such measures were impossible, that the injured party caused the damage, or that the complaint was not made in the proper time or in the proper form.¹⁹

In considering carrier liability for cargo and passenger, the concepts of maritime law are noteworthy. In England, before the 1911 Collision Convention, the owner of cargo, on a surface vessel which came into half-damage collision, could collect half its damage only from either vessel. In admiralty law, cargo is not considered "innocent," but is deemed to some extent to assume the general risks of navigation; passengers are "innocent" and do not assume the risks that cargo does and may, therefore, recover *in solido* against either wrongdoer carrier.²⁰

Apparently no English case has held an air carrier to be a common carrier;²¹ the law is the same in Canada, but to the contrary in the United States. Carriers not common carriers are liable only for loss or damage resulting from negligence and are not insurers. In absence of statute, a carrier may, by the terms of the contract of carriage, limit or exclude altogether, his liability for loss of or damage to goods carried, thus protecting the carrier from his liability for negligence. A common carrier, however, is under double liability with regard to goods, both as an insurer and for negligence. Formerly, England, contrary to the United States, upheld contracts to carry goods "at the owner's risk," if there were a reasonable option of terms²² and a reasonable limit per package. Today, by the Carriage by Air Act of 1932 cannot fix a lower liability limitation than the £250 provided by the act and may defend himself by a showing that he has taken all necessary measures to avoid damage.

UNITED STATES

As aviation law depends, to some extent, on the already developed law of the land, so, aviation law in the United States is founded on the previously established American conceptions of common law tort and contract liability, with regard to operator, manufacturer, bailee or injured party, and of the common law definition of property rights

¹⁸ *Coggs v. Bernard*. 92 English Reprints 107 (1703).

¹⁹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, 1929. Article 20. 22 & 23 Geo. V, c. 36.

²⁰ Aviation Law and Admiralty. Arnold W. Knauth. 6 Air Law Review 266 (1937) and Francesco Cosentini in "Air Law and Comparative Law." 7 Tulane Law Review 13.

²¹ *Supra*, 9, Shawcross §295.

²² Air Carriers' Liability in Comparative Law. Arnold W. Knauth. 7 Air Law Review 261 (1936).

with regard to the use of the air space and the acquisition of land for airports and zoning regulations. The United States has defined aircraft as "any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air," which probably covers what otherwise might be classed as projectile.²³

Basically, the federal statutory law is the Civil Aeronautics Act of 1938.²⁴ This Act regulates economic and safety features of United States aviation. The Civil Aeronautics Board, set up under the Act, certifies domestic carriers only on a showing of a public convenience and necessity. Foreign air carriers, too, must prove that they are fit, willing and able to perform air transportation and to conform to the provisions of the Act, the rules, regulations and requirements of CAB, and before such foreign air carriers may engage in local service, they must receive approval by the President of the United States. Safety is a prime concern of the Board. Although safety is a purely relative factor and nothing is absolutely safe,²⁵ Air Traffic Rules,²⁶ devised to minimize dangers, and rules providing for lights, procedure in meeting, passing, overtaking another carrier, all resemble Rules for the Prevention of Collisions of Vessels at Sea, and, also, highway regulations. Seaplanes on the water are to navigate according to the laws and regulations of the United States governing the navigation and operation of water craft. A Uniform Aeronautics Act has been promulgated in twenty states, thus far, to bring a measure of consistency in various jurisdictions.²⁷ Customary law governs the liability of aircraft for criminal wrongs²⁸ and the priority of mortgage claims.²⁹

Property rights of landlords were once believed to be in accord with the maxim *cujus est solum*. However, the phrase is considered of doubtful validity in England³⁰ and has been repudiated in the United

²³ U.S. Civil Aeronautics Act, 1938; Public Law 706, 75th Congress. S. 3845. 52 Stat. 973; 49 USC 401 (1940) §1(16).

²⁴ Air Commerce Act, 1926. 49 USC §171 et seq. 44 Stat. 568, 572. Civil Aeronautics Act, 1938; Public Law 706, 75th Congress. S. 3845, 52 Stat. 973; 49 USC 401 (1940).

²⁵ Before the advent of the Interstate Commerce Commission, Mark Twain commented that the two things most typically American were ice-water and railroad accidents.

²⁶ Air Commerce Regulation. Chapter VII.

²⁷ Uniform State Law of Aeronautics, 1925. Adopted in Arizona, Delaware, Hawaii, Idaho, Indiana, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wisconsin.

²⁸ Aircraft Confiscation Act of 1939 (1939 U.S.A.V.R. 229) Public Law 357, 76th Congress; Chapter 618, 1st Session, H.R. 6556 provides for seizure, forfeitures of vessels, vehicles and aircraft used to transport narcotics, drugs, firearms, counterfeit coins, obligations, securities, paraphernalia.

²⁹ *U.S. v. Hunter*, CCA 5th, 80 Fed. 2d 968. An innocent mortgagee of an airplane has priority over the claims of the United States for forfeiture for violation of customs laws and regulations. *U.S. v. Curtiss Robin Airplane NE 76*, U.S. Dist. Ct., So. Dist., Fla., 1932. Intervening claims for storage, labor, materials, are superior to those of the United States for civil penalty for violation of Air Commerce Regulation.

U.S. v. One Fairchild Seaplane. 6 Fed. Supp. 579 and *The Tomaston*, 26 Fed. 2d 279. Liens for labor under Maritime Laws for repairs of a seaplane were preferred to penalties assessed by the Treasury Department.

³⁰ Rowland W. Fixel. *The Law of Aviation*. 3rd Ed., Michie Co., page 53.

States.³¹ It is now considered that over-flights are in the public interest, not generally constituting trespass.

Anglo-American common law bases tort liability on fault. With regard to negligence, there must be a finding of a standard of duty based not on what this or that particular man is capable of, but on the foresight and caution of the prudent man — the average reasonable man, standing in this or that man's shoes. It was once considered that Roman law recognized three degrees of care: slight, ordinary and extraordinary. Now it is considered that there are but two standards: ordinary care, of a reasonably prudent man under the circumstances, and extraordinary care, commensurate with the risk of danger, as the duty of a carrier towards its passenger. Under both civil and common law, every invasion of a private right imports an injury and for such injury the law gives a remedy — a remedy commensurate with the injury received and the resulting losses.³² Contrary to civil law, common law

³¹ In the earliest case, *Guille v. Swan*, 19 Johns. 381 (N.Y. 1832) an aeronaut who ascended in a free balloon, drifted over and descended on the property of plaintiff and was sued for damages to the plaintiff's garden by a crowd of curious people who broke through fences and trod down his vegetables and flowers. It was held that the balloonist was responsible for the physical trespasses of persons who rushed to his aid in the garden; the aeronaut should have foreseen that a curious crowd would follow the balloon in its course and in the event of its descent, at a particular place, would rush forward to investigate or assist the balloonist. (*Ryland v. Fletcher* doctrine.)

Johnson v. Curtiss Northwest Airplane Co., Dist. Ct., Ramsey Co., Minn., 1923. "... the maxim is an aphorism of law ... the upper air is a natural heritage, common to all the people ... its reasonable use ought not be hampered ... by an artificial maxim of law ..."

Northwest Airlines v. Minnesota. 322 US 292 (1945). "... the landowner no more possesses today a vertical control of all the air above him than a shore owner possesses a horizontal control of all the sea before him. Air is too precious an open highway to permit it to be owned to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use."

U.S. v. Causby, 96 SC 1062; 328 U.S. 256 (1946). "... to recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest and transfer into private ownership that to which only the public has a just claim. Airspace is a public highway. ... Landowners own at least as much of the space above the ground as they can occupy or use in connection with the land. ... The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."

Sweetland v. Curtiss Airport Corp. 41 Fed. 2d 929, 55 Fed. 2d 201 (1931). "... the owner of land has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface; and as to the upper stratum which he may not reasonably expect to occupy, he has no right, except to prevent the use of it by others, to the extent of an unreasonable interference with his complete enjoyment of the surface. The height below which the property owner may reasonably expect to occupy airspace for himself is varying and not definite and must be determined upon the particular facts of each case. Apart from such uses, the air is free from all claims on the part of the proprietors of lands over which flights take place."

Hinman et al. v. Pacific Air Transport Corp., 300 US 654 (1936), established that aviators, generally, may fly wherever there is air, as watercraft may sail wherever there is water.

³² *Allison v. Standard Air Lines, Inc.* 1930 U.S.Av.R. 297. The court charged the jury, inter alia, that while the law demanded the utmost care for the safety of passengers, it did not require the air carrier to exercise all the care, skill, diligence of which the human mind could conceive, nor such as would free the transportation of passengers from all perils ... and the passengers take upon themselves all the usual and ordinary perils incident to aeroplane travel which could not be averted by the carrier through the exercise of that degree of care which the law required.

gives a remedy to neither party when two aircraft collide with mutual fault; a defense of contributory negligence may prevent either aircraft owner from recovering. Again, one looks to a comparison with admiralty law. Comparisons are not altogether valid, for the unique characteristic of most aircraft collisions is suddenness, with the death of all participants, whereas ship collisions, on the contrary, usually develop slowly and rarely destroy either the lives of the actors or their written records. In maritime law, the rule of half damages may apply to collisions of aircraft in navigable airspace, the common law of the underlying sovereign applies. In fact, the United States so bases its tort liability on the fault of the actor³³ that there was some question of the validity of our adherence to the Rome Convention of 1933, with its provision of limited but absolute liability to third parties on the ground, as such imposes insured liability without fault and deprives a jury of the prerogative of fact-finding and damage-assessing.³⁴

In maritime law, the carrier of goods is not liable for damage to the goods resulting from faults of navigation,³⁵ although this is not interpreted to cover the carriage of passengers. Passengers embark on the sea legally free from the assumption of risk of negligent human behavior of navigators, just as in carriage on land, and they may, therefore, recover damages for negligent collision *in solido* from any wrongdoer against whom they can proceed. There is, obviously, a grave factual difference in these modes of transportation: in a mid-air collision, structures, cargo, personnel and passengers fall to the bottom of the ocean of air and damage the earth's surface; ships and cargoes often sink to the bottom of the sea, but only occasionally damage

³³ *Nova Mink v. Trans-Canada Airlines*. 1951 U.S.Av.R. 40. "It is important that no rule be applied to the operation of aircraft which is based on false analogy (with railways or highway law) or on a warped view of public policy. The necessary accommodation between operation and private rights may be affected by legislation or by the course of judicial decision. The courts should apply the law of negligence to aircraft operations except where specifically excluded by statute."

³⁴ *Crowell v. Benson*. 285 US 22 (1932) "... Congress has no general authority to amend maritime law so as to establish liability without fault in maritime cases, regardless of the peculiar circumstances or relations. . . . It is unnecessary to consider what circumstances or relations might permit imposition of such a liability. . . . It is manifest that some suitable selection would be required . . . liability without fault in a contractual relationship or in peculiar circumstances, i.e., in an airplane crashing to the ground through no known reason and causing damage. . . . The aircraft may be faultless and the person injured free from contributory negligence. Natural justice demands that the victim be compensated; the common law says 'no fault, no liability'."

³⁵ *Harter Act*, 1893. 27 Stat. 445; 46 USC §192 (1926), sec. 3: "If the owner of any vessel transporting merchandise or property to or from any part of the USA shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner, agent shall become or be held responsible for damage or loss resulting from faults or errors of navigation or be held responsible for damage or loss, resulting from faults or errors in management of said vessel, or shall the vessel, her owner or charterers, agent or master be held liable for losses arising from the dangers of the sea or other navigable waters, acts of God or public enemies or the inherent defect, quality or vice of the thing carried or from insufficiency of package or seizure under legal process or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

tunnels, submarine cables, and piers and wrecks may obstruct navigation and cause further damage. Merely taking passage in an aircraft or shipping goods by air is not an act to import assumption of risk and to preclude recovery from the air carriers, and, as against an air carrier, the United States passenger or shipper by air can recover judgment *in solido* against any wrongdoer against whom he can proceed. The Uniform States Law of Aeronautics recognizes that subjacent tort law is applicable to aviation accidents.³⁶

In the United States generally, public policy bars any contract between passenger or shipper and carrier which relieves the carrier of all liability in any event. However, with regard to goods carried, the shipper may agree to a liability limitation.³⁷ In personal death claims, the liability of the carrier may be governed by the local State law (a local Lord Campbell's Act) by provisions for a definite maximum of liability limitation, or no fixed maximum, or statutory prohibition against the carrier enjoying the benefits of a maximum limitation, or a constitutional prohibition against limiting the amount recoverable in fatal accidents. In personal injury or death actions, claimants have used the arguments of *res ipsa loquitur* in early cases, negligence and the violation of statutory regulations;³⁸ defenses have involved the assumption of risk, contributory negligence,³⁹ *vis major* (unforeseen events and inevitable accidents) and sudden emergency.

In regard to international flights, the Warsaw Convention governs in passenger and cargo claims⁴⁰ and the Rome Convention may become applicable to injuries to third parties on the ground.⁴¹

FRANCE

Practically every branch of law is concerned with the law of aviation, which deals in fields of property, contracts, agency, bailments, carriers, torts, damages, insurance, liens and corporations. French civil law precepts are elastic enough to meet most of the problems of the new science of the air.

³⁶ Supra, 27, Section 6. "The liability of the owner of one aircraft to the owner of another aircraft or to aeronauts or passengers on either aircraft for damage by collision on land or in air shall be determined by the rules of law applicable to torts on land."

³⁷ *Herndon v. Gregory*. Ark. Sup. Ct., 1935; 81 S.E. 2d 849.

³⁸ *Morrison v. LeTourneau Company of Georgia et al.* US CCA 5th, 1943. 138 Fed. 2d 339. *Rinehart et al. v. Woodford Flying Service et al.* W. Va. S.C., 1940. 9 S.E. 2d 521.

³⁹ *Curtiss-Wright Flying Service, Inc. v. Williamson et al.*, Texas Ct. Civil Appeals, 1932. 51 S.W. 1047.

⁴⁰ 49 Stat. 3000; U.S. Treaty Series No. 876. February 13, 1933 is the effective date of the Convention.

⁴¹ 1933 U.S.A.v.R. 284. (The Delegation of the United States declared upon signing that the Convention shall apply only within the continental limits of the United States of America exclusive of the territory of Alaska.) Convention on Surface Damages (Third Parties), signed in Rome, 1935, not yet ratified by the United States. U.S. Treaty Information Bulletin No. 47, page 27.

Before the French Air Navigation Law⁴² of 31 May 1924, air carriers and aircraft owners were free to exonerate themselves from liability (except for *dol* — wilful or fraudulent act) by appropriate clauses in passenger tickets and cargo contracts. The 1924 law declared that the *transporteur* is a guarantor of the safety of passengers and goods up to 1,000 francs a package, subject to defenses of *force majeure* and inherent vice of the merchandise (comparable to common law). The *transporteur* may by express contract provision relieve himself from liability incurred by reason of *risques de l'air*^{42a} and faults of persons employed in conduit and defect of the aircraft, provided it was in good navigable condition and airworthy at the start of the journey, but any poor functioning in mid-air does not necessarily constitute a fault of the carrier. The *transporteur* may not contract out of his liability for care, custody, loading or discharging of goods and may not contract out of his "personal fault."⁴³ The law further makes the *exploitant* (operator) absolutely liable for surface damage done while the aircraft is in motion; there is no limit on the amount, no deposit of cash, no bond, no insurance required. The law, thus, imposes liability on the air carrier for injuries to passengers, resulting from commercial faults, but spares it from liability for injuries resulting from faults of navigation.⁴⁴ Within the purview of the same law, the fault of the pilot, even when proved by the injured party, is a fault of navigation, for which the carrier is not liable.

In French law, the liability of the carrier to persons is contractual in nature. The carrier has the obligation of carrying the passengers *sain et sauf* to the destination; when the passenger incurs death or

⁴² a. Howard S. Leroy. "Observations on Comparative Air Law" 6 Air Law Review 226. 1937.

b. Arnold W. Knauth, "Air Carriers' Liability in Comparative Law." 7 Air Law Review 261. 1936.

c. Lincoln G. Cha. "Air Carriers' Liability to Passengers in International Law." 7 Air Law Review 33. 1936.

^{42a} For a discussion of air risk, particularly the French law of 31 May 1924 and the need for its revision, with proposed definition, see *Le Risque de L'air*, par J. Lacombe et M. Saporta. *Revue generale de l'air*, No. 1, 1952; 15:1-18.

⁴³ French Air Navigation Law, 31 May, 1924. *Journal Officiel* (Mai-Juin, 1924) 5048. *Supra* 42c.

Article 41. "The carrier is liable for loss or damage of merchandise carried, except in cases of *force majeure* or the inherent defect of the merchandise. However, if the value of the merchandise has not been declared by the shipper, the liability of the carrier is limited to the sum of 1,000 francs per article."

Article 42. "The carrier may, by an express clause, exonerate himself from liability which he incurs by reason of risks of the air and of fault committed by any person employed on board in the conducting of the aircraft carrying either passengers or merchandise. This clause discharges the carrier of his liability only if the aircraft was in good condition of navigability upon departure and if the personnel was provided with licenses and regulatory certificates. Special administrative certificates establish in favor of the aircraft and crew a presumption, which may be combatted by proof to the contrary."

Article 43. "Every clause is null whose purpose is to relieve the carrier of liability either for his own act or for that of the employees when such act relates to the sending, preservation and delivery of merchandise. Every clause is void which has for its object the exoneration of the carrier from liability for personal faults."

Article 48. "The carrier may be relieved of liability by reason of accidents to passengers under circumstances contemplated in Article 42."

⁴⁴ Cf. *Supra*, 35, U.S. Harter Act, and *Infra*, English law section.

bodily injury, the carrier is under obligation to compensate the injured party for damages sustained. The French Civil Code⁴⁵ provides for liability for injury and damages to persons and goods, basing it on fault; the French Commercial Code makes no provision for carriage of persons.

French law applies principles of carriage of goods to carriage of persons. The French carrier does not incur *contractual* liability for the death or personal injuries of passengers, if he has inserted the non-liability clause in the contract of carriage, the ticket, but the carrier does incur *tortious* liability if any personal fault on his part can be proved by the injured party. By French statutory law, liability of a carrier of merchandise is contractual in nature. An inherent defect of the aircraft is not *force majeure* to exonerate the carrier, as the carrier has an obligation to make periodic inspection of the aircraft and must have a certificate of navigability.

By French case law, the relatives of a passenger injured or killed can claim against the carrier for moral⁴⁶ as well as pecuniary damages, with no order of preference with respect to claims for compensation, so that the carrier may face action he cannot foresee in number nor calculate in significance.⁴⁷ Although case law is not controlling in

⁴⁵ French Civil Code of 1895. Supra, 42c.

Contract: Article 1147. "A debtor shall be ordered to pay damages if there is occasion therefor, either on account of non-performance of the obligation or on account of delay in performing it, whenever he does not establish that non-performance is due to an outside cause which cannot be charged to him, provided there is no bad faith on his part."

Article 1148. "No damages shall be due when the debtor has been prevented from giving or doing what he had bound himself to do, or has done what was prohibited, in consequence of superior force or fortuitous event."

Tort: Article 1382. "Every act whatever of an individual which causes injury to another obliges the one owing to whom the same has occurred to make it good."

Article 1383. "Everyone is responsible for the injury which he has caused not only owing to his own act, but owing to his negligence or his imprudence."

Carrier: Article 1784. "Carriers are responsible for loss of or injuries to the things which are entrusted to them, unless they prove that the same have been lost or injured accidentally or by superior force."

French Commercial Code. Article 103. "The carrier's warranty extends to the loss of the goods carried, except in cases of *force majeure*. His warranty extends to damage other than that which accrues from the inherent defect of the article or *force majeure*. Any clause containing a contrary provision, inserted in any way-bill, price list or other document whatsoever, is void."

⁴⁶ Ripert. *La Responsabilité du Transporteur Aérien après le Projet de la conférence internationale de Paris de 1925*. Rev. Journ. Int. de la Locom. Aérienne (1926) 12. "Au cas de décès d'un voyageur, la jurisprudence admet que les parents de cas voyageur peuvent agir en dommages et intérêt contre le transporteur pur la dommage moral sui leur est cause par cette mort, tout aussi bien que pour le dommage pecunaire. D'après la jurisprudence française, cette action appartient a toutes les personnes qui sent blessees moralement par le décès et il n'y a entre ces prsonnes aucun order de préférence. Les décisions recents ont même admetts l'action de collateraux ou de imples allias. Le Transporteur est donc expose en case de decés du voyager victime, actions donc i ne peue ni prévoir le nombre ni calculer l'importance."

⁴⁷ The 1929 Warsaw Convention eliminated double liability by providing for legal limitation of liability on international carriers of 125,000 francs; therefore, relatives of passengers injured in international carriage, know that the maximum amount of compensation they may recover from the carrier is 125,000 francs. There may yet be questions of apportionment of that amount.

French law,⁴⁸ some cases support the view that pleading must be carefully done in French courts, either on the basis of tortious or contractual liability,⁴⁹ and the validity of a contractual non-liability limitation and the necessity of proving fault to affix tort liability are important.

GERMANY AND WESTERN EUROPE

General consideration only can be given to the status of aviation law in the rest of Western Europe. Again, aviation law is based on standard Code provisions and a few specific statutory regulations.

⁴⁸ Sir Maurice Sheldon Amos and Frederick Parker Walton. "Introduction to French Law" (Oxford, 1935), 7. "There is no fundamental axiom of French law that a judicial determination of an issue of law, even by the highest court of the land has declarative authority in any other case or proceeding. Nevertheless, any reported decision (unless discredited) has some measure of persuasive weight; and this persuasive weight steadily increases as the courts progressively settle down to a uniform and consistent attitude on any particular point; so that an undeviating practice, a *jurisprudence constante*, adopted by the Cour de Cassation has an authority barely distinguishable when judged from a practical standpoint, from a settled line of decisions of our own courts. No single decision makes a law; but it is reasonable to say that an established course of decision indicates and expresses a judicial practice or custom which is indistinguishable from law."

⁴⁹ a. La Cour d'Appel de Paris (reversing trial court's 1924 decision) Gazette du Palais, 1924, 1-687, stated that contractual obligation principles obligate the company (Le Compagnie Franco-Roumanie de Navigation Aérienne) to carry the passenger safely to his destination and the carrier is liable for non-performance of that obligation if he cannot establish the presence of *force majeure* or a fortuitous event or an outside force not under his control. Risks of air navigation may be more difficult and less certain, but they cannot constitute ground for liability exception. The carrier is relieved of liability only for very exceptional risks which arise under circumstances which must be proved by the carrier and which are in the proper consideration of the court.

b. Le Tribunal Civil de Vienne, Judgment 4 Dec. 1924 and La Cour d'Appel de Grenoble, 25 March, 1925, held in the death of Mme. Gauthier that the carrier is liable to carry *sauf et sain* the passenger to his destination, unless the carrier proves the presence of fortuitous event or *force majeure* or fault of the victim or an outside cause not under his control. Rev. Jur. Int. de la Locom-Aérienne (1926), 54, 293.

c. In the death of M. Carroll in the British Channel following the fall of an airplane, the trial court held the accident was due to an outside cause not attributable to the carrier and, as the pilot was found sane and the aircraft was found to be in good condition of navigability, therefore, the carrier was not liable. (Rev. Journ. Int. de la Locom. Aérienne (1925) 58-62. (Droit Aérien 1930) 563-565.

d. Article 1382 of the Civil Code was invoked by the widow of M. Courson de la Villeneuve, killed aboard an airplane of la Societe Latercoere in a 300,000 franc suit for herself and 200,000 franc suit for her son and transportation of the body of her husband. The Tribunal de la Seine, 28 July 1924, declared that plaintiff's charge was not founded on tortious liability, as she had not proved the carrier's fault, and if the air carrier were to have contractual obligation to guarantee the safety of the passenger, this obligation would have been effected by means of long standing and common practice, whereas, this is a special relationship and a non-liability clause in contracts of carriage should be legal and valid. The Civil Code tacitly recognized and the Air Navigation Act expressly permits the use of non-liability clauses in contracts of carriage, so the carrier cannot incur contractual liability. On appeal to the cour de Cassation, 21 July, 1930, it was held that the company was not liable as there is no prohibition against a carrier limiting liability for accidents imputable to his personal fault. A non-liability clause is valid to the extent it exonerates the carrier from liability resulting from risks of the air. An air carrier cannot incur quasi-tort liability, as herein the injured party has not proved the poor functioning of the aircraft nor the fault of the carrier. Droit Aérien (1930) 743. Rev. Jur. Int. de la Locom. Aérienne (1927) 243.

In Germany and Austria and pre-revolutionary Russia,⁵⁰ there were two different sets of rules established, one for injuries caused by railroads, steamships, factories and the like and another for all other types of injuries. By the German Civil Code, liability is incurred for wilful or negligent injury to another.⁵¹ A person who infringes a statutory provision intended for the protection of others incurs liability; however, according to the purview of the Code, as infringement is possible even without fault on the part of the wrongdoer, the duty to make compensation arises only if some fault can be imputed to him.

Initially, in Germany, as in France and England, an air carrier could freely contract out of all liability except for personal, wilful and fraudulent acts (*Vorsatz*), and the owner's liability could vary according to the situation of the persons and property on the ground, or according to whether there was proof that damage was caused by the fault of the aircraft owner. In Germany, and in Switzerland, the owner of an object could free himself from liability by proving that he had taken every precaution to prevent the damage.⁵² By the German Act of 1 August, 1922, revised 21 August, 1936, there is an imposition of liability on the operator (*Halter*) for all injuries to persons and property in the aircraft, in any other aircraft, or on the surface, caused by *Benutz* (use or operation) of the aircraft. *Halter* is the one who possesses or employs the aircraft for his own account, who is entitled to the profits and who assumes the cost of maintenance; he need not be the owner. If the aircraft is used without the knowledge and consent (*Wissen und Willen*) of the *Halter*, then the person who uses (*Benutzer*) the aircraft is bound in place of the *Halter*. The *Halter* is not liable unless he is negligent in letting the aircraft get into unauthorized hands. Thus, it would seem that the public has no protection against that dangerous type of aviator.

With regard to surface damages, there is absolute liability for damage to persons or property on the ground imposed on the *Halter* or *Benutzer*. The *Halter* must make deposit of funds or have insurance in the amount of 75,000 Reichsmarks for claims that might be filed — yet there is no law for third party rights against insurers.

The liability of the *Halter* is 30,000 Reichsmarks per passenger per death or injury and 100,000 Reichsmarks for small aircraft or 300,000 Reichsmarks for large aircraft, per disaster, for all claims. Although there is a general right to make a special contract, exempting the *Halter* from liability for negligence, the carrier issues an acci-

⁵⁰ Vladimir Gsovski. *Soviet Civil Law: Private Rights and Their Background Under the Soviet Regime*. University of Michigan Law School, 1948, page 492.

⁵¹ Germany, *Civil Code*. Article 923. "A person who wilfully or negligently, unlawfully injures the life, body, health, freedom or property or any other right of another, is bound to compensate him for any damage arising therefrom."

⁵² Ripert. *La Responsabilité du Transporteur Aérienne d'Après le Project de la Conférence Internationale de Paris de 1925*. Rev. Jur. Int. de la Locom. Aérienne (1926) 12.

dent insurance policy as a part of every ticket. Damage claimants may sue otherwise than under the Act of 1922, and, thereby, on proof of negligence of the *Halter*, exceed liability limitations. Remedies also exist for nuisance cases, hangar damages and suits against the pilot (*Fuhrer*), without limitation on recovery.⁵³ By the German Civil Code, the heir may recover for costs of medical expenses, earning capacity destroyed or diminished, increase in prosperity made more difficult, necessities increased and funeral expenses. A third party can recover for deprivation of maintenance and loss of service.⁵⁴

In Italy, as in the German and French and maritime law, if an airplane crashed and was wrecked, as on a building, the owner of the aircraft could discharge his liability to the owner of the building by abandoning his wreck. This abandonment to compensate for damages is part of statutory enactment⁵⁵ with regard to a blameless owner of an aircraft, although, obviously, after an accident the value of the aircraft is reduced to the nadir and the injured persons are not thereby compensated. The Italian Code does, however, impose responsibility and insure a lien for indemnity for dead and injured.⁵⁶ Concessions and authorizations for operation or for subsidies in air navigation are made only after a deposit by the air carrier of documents attesting that the company has effectively guaranteed, in an adequate amount, the reparation of damages to non-navigating third parties.⁵⁷ This enforces an obligation.^{57a}

The Polish Code provides an obligation to make reparation for injury caused by fault⁵⁸ and the same provision exists in the Austrian

⁵³ See, Arnold W. Knauth, "Air Carriers' Liability in Comparative Law," 7 Air Law Review 261 (1936) and Howard S. LeRoy, "Observations on Comparative Air Law," 6 Air Law Review 226 (1936).

Provisions for obligatory insurance are also provided for in the air law provisions of Italy, Denmark, Bulgaria, Norway, Sweden, Switzerland, Czechoslovakia and Louisiana.

⁵⁴ For a survey of existing laws and regulations governing air transport in Germany see the following:

Die Materiell- und Verwaltungsrechtlichen Grundlagen des Gegenwärtigen Luftverkehrs im deutschen Bundesgebiet, Von Alfred Wegerdt. *Zeitschrift für Luftrecht*, No. 1, 1952; 1:10-28 and *Grundzüge der Schwedischen Luftfahrtgesetzgebung*, von Kurt Grönfors, *Zeitschrift für Luftrecht*, No. 1, 1952; 1:44-52.

⁵⁵ Italian Air Navigation Law, 1924. Article 42. "... even when an aircraft has been rented, the owner may free himself from liability by abandonment, to all creditors or to some of them, the aircraft and the freight which the aircraft has received and which it is to receive, except where there is fault on his part." (This Law has only 51 articles.) *Rev. Jur. Int. de la Locom. Aerienne* (1924) 151.

⁵⁶ *Ibid.*, Article 39(2).

⁵⁷ Italian Air Regulations, Article 267.

^{57a} A consideration of post-war Italian civil aviation problems is given in *Note sull'Aviazione Civile*, de Amedeo Giannini. *Rivista Aeronautica*, No. 11, 1951; 27:815-821. *La Politica Legislativa Aeronautica italiana dall'entrata nella seconda guerra mondiale al patto del Nord Atlantico*, di Luigi Candela. *Rivista aeronautica*, No. 11, 1951; 27:807-813. A digest and guide to Italian aeronautical legislation, military and civil, June 10, 1940 to the ratification of the North Atlantic Pact.

⁵⁸ Polish Code of Obligations, 1933. Article 134. "Whoever by his fault causes injury to another shall be liable to repair it."

Article 135. "Whoever intentionally or by negligence causes injury to another in the exercise of his right shall be liable to repair it, if he exceeded the limits determined by good morals or the purpose for which that right was enjoyed by him."

General Civil Code.⁵⁹ There are no special acts on damage on the earth's surface by aircraft (probably because ordinary civil codes provide an adequate remedy) in Belgium, Holland, Spain, Portugal, Greece, Romania, Esthonia or Latvia.⁶⁰ However, statutes similar to the German imposition of liability on the carrier exist in Denmark, Norway, Sweden, Italy, Switzerland, Austria, Hungary and in the 1933 Code of Yugoslavia.⁶¹ Article 38 (4) of the Czechoslovakian Code of Aviation fixes air carrier responsibility and insures a lien to idemnify the dead or injured.

The Swiss law of 27 January 1920, Article 29, provides for the right of retention of an aircraft in the event of forced landing and damage to private property,⁶² on the basis that loss and damage must be repaired even if the owner of the aircraft is not responsible. The person to whom the aircraft has been ceded, loaned or rented, is substituted for the owner in a position of responsibility and any fault of the owner is held to preclude his freeing himself from responsibility for damages by abandonment. As the right of the individual ceases where the superior social interest prevails, the State may expropriate land for airports and may, by legislation, permit freedom of flight. Following this theory, the Swiss Civil Code, Article 667, provides that individual property rights cease at a height where it may no longer be used, a doctrine comparable to that expressed in our *Hinman* case.⁶³

Consideration of these national laws is important, as an aircraft remains under the jurisdiction of its own national laws for many purposes, not otherwise controlled by international law.

LATIN AMERICA

Aviation law in Latin America developed, as elsewhere, on the basis of existing civil law codes supplemented by special legislation. South America early became the scene of exploitation by local airlines and the international air carriers Pan American Airways⁶⁴ and Deutsche Lufthansa.

By enacting a formal and comprehensive air regulation in 1925,

⁵⁹ Austrian *General Civil Code*, 1895. Article 1295. "Anyone is entitled to claim compensation from him who caused an injury by his own fault. The injury may be caused by violation of a contract or without any relation to the contract."

⁶⁰ Supra, 53, Knauth.

⁶¹ Ibid.

⁶² Francesco Cosentini. "Air Law and Comparative Law." 7 Tulane Law Review 292.

⁶³ *Hinman et al. v. Pacific Air Transport Corporation*. 300 US 653 (1936). See: *Droit Douenier et Nouveau Droit Aérien Suisse*, par Paul Ossipow et Barnard Wehrly. *Revue française de droit aérien*, July/Sept. 1951; 5:243-278.

On accident investigation practice in Switzerland, see: *Flugunfall Untersuchungen*, von Werner Guildimann. *Schweizer Aero-revue*, Aug.-Sept., Dec. 1951, Jan. 1952; 26:348-349, 407-410, 525-526; 27:36-38.

For a summary of two recent Swiss air regulations, effective September 20 and October 20, 1950, see: *Ordonnances Fédérales Suisses sur les règles de L'air et des licences du personnel navigant*, par Jean T. Lecour. *Revue Française de droit aérien*. July/Sept. 1951; 5:279-284.

⁶⁴ Matthew Josephson. *EMPIRE OF THE AIR*, 1944, Harcourt, Brace & Co.

Brazil⁶⁵ became the first Latin American country to promulgate an air law and thereby anticipated even the United States Air Commerce Act of 1926. When German interests began the operation of a domestic air company in Colombia in 1920, that country became the first of these nations with a commercial air transportation system.

South American lawyers originally assumed that air carriers, like other commercial carriers, should be governed by the commercial and civil codes in matters of liability. That theory is still good. Air carrier liability is based on the codes of commercial and civil law in, of the twenty Latin American countries, the sixteen nations of Argentina, Bolivia, Brazil, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru and Uruguay. Twelve of these sixteen states have public or administrative legislation on civil aeronautics and the problems of air space sovereignty, rights of innocent passage, registry of aircraft, qualifications of airmen, prohibited flight zones, customs, clearance and air mail, but with no specification of air carrier liability. Three countries, Chile, Mexico and Venezuela, have definite laws on air carrier liability. Brazil, Costa Rica, Guatemala, and Nicaragua have some special legislation in regard to liability.⁶⁶

Contrary to English law, the status of an air carrier as a common carrier was at the outset clearly accepted in Latin America. Liability of the air carrier, in countries whose law is the civil code, is either that of an insurer or that arising from fault and negligence, which is presumed against the carrier. The liability of an air carrier as an insurer extends to all goods except for loss or damage caused by act of God, public enemy, act of the shipper, act of public authority, or inherent defect of the goods. This liability as an insurer as applied to cargo, arises from the civil law principles already noted in French law, that there is a contractual obligation to transport goods safely to their destination. Such liability is also extended to the carrier's passengers, a precept alien to common law. Defenses thereto include *force majeure*, fortuitous event and inherent vice or defect of cargo.

In contract actions, based on fault or negligence, there is a legal presumption against the carrier, a presumption which does not exist in tort action by passenger or shipper. In action for damages to third persons and to their property, based on fault or negligence, negligence is not presumed against the carrier, but it must be proved by the complainant in order to recover, as there is no privity of contract with the carrier. In a contract action for cargo loss or passenger injury, the presumption of fault or negligence against the carrier shifts the burden of

⁶⁵ For a compilation of Brazilian aeronautical laws and regulations effective January 6, 1932 through December 30, 1950, including international conventions and agreements with foreign countries, see: Brazil Ministério da Aeronáutica. *Directoria de Aeronáutica Civil. Manual de legislação aeronáutica. Publicação preparada pela Divisão Legal em cooperação com a seção de divulgação da Divisão Aerodesportiva.* Rio de Janeiro, 1951.

⁶⁶ David E. Grant. "Air Carrier's Liability: Latin America." 7 Air Law Review 292.

proof and requires the carrier to prove as defense that the damage was due to an act of an independent agency or that the carrier exercised reasonable care to prevent the damage. In a tort action, where the carrier has been at all at fault, the contributory negligence of the passenger or shipper or third party merely operates to reduce damages and does not relieve the carrier completely of liability. This is the principle of apportionment of damages of civil and maritime law.

There are, apparently, no quantitative maxima or other restrictions on the carrier's liability for injuries to persons or for loss and damage to cargo in the South American countries. Also, there is no uniformity on the time in which suits must be brought; the period ranges from three months to thirty years. Under civil law codes of Latin America, an air carrier cannot, by the insertion of a clause in his contract of transportation, exempt himself from liability; the inclusion of such a clause is an illegal act and is simply null and void. However, Ecuador considers that an exemption clause totally exonerating the carrier for air risks is valid, but that, otherwise, there is no limitation on the amount of the indemnity and if liability is at all assumed by the carrier, that liability is unlimited.

Variations in the special air legislation of these countries may be summarized briefly.

Guatemala imposes on the operators of all transportation vehicles what is virtually an absolute liability for death or injury, but, to give some protection to the operator, there is a quantitative limit on that liability.⁶⁷

The Chilean law of Aerial Navigation is broad enough to impose an absolute liability on the air carrier for injuries or damages to persons or things on the surface⁶⁸ and yet it recognizes the validity of an exemption clause for cargo loss if expressly stated by the carrier in the contract and if the craft is airworthy and the personnel licensed.⁶⁹ Suits on causes arising in air transportation must be filed in Chile within three months' time. Uniquely, Chile, also, has a National Fund for Airmen, a special law for pilots.⁷⁰

Venezuela, by legislation, prohibits flights over cities, useless and dangerous stunt flights, air circuses, flights over airports used as experimental fields, flights over ships at sea, sea flights of more than fifty miles from shore and night flights.⁷¹ Venezuela limits the liability of

⁶⁷ Guatemala. Legislative Decree Number 1827 of 6 May 1932.

⁶⁸ Chile. *Law of Aerial Navigation*. Article 52. "... for all damages and prejudices which the aircraft may cause to persons or things, the owner of the ship or the lessee and commander and author of the damage shall be jointly liable." (No defense mentioned.)

⁶⁹ Ibid. Article 43. "... in regard to contracts of transportation, the carrier, by express clause, may exempt himself against air risks and faults committed by the crew, so long as the aircraft, on departure, is in good condition of navigability and the flight personnel are duly licensed."

⁷⁰ Chile. Labor Law. Article 31(f) of 18 March 1925.

⁷¹ Venezuela Laws of 16 June 1920, Articles 28 and 29. This may be compared to the prohibition in the United States against hunting from a plane, and the like as in Act of 3 July 1918, c. 128, §3; 40 Stat. 766; 16 USC §704(3).

the air carrier for passenger and cargo loss in fault and negligence to "failure to take technically prescribed precautions to avoid damages." As to third parties, the Civil Code states that a defense that the injury or damage was unavoidable and that there was no negligence relieves the carrier from liability.⁷² In absence of special agreement for a larger amount, the Code provides a maximum liability on the air carrier for each passenger of 20,000 bolivares (\$5,000)⁷³ with no limitation on the amount of claims for injury to persons or property or third parties. A limitation of one year from the date of injury or damage is placed on the filing of suits.

The national aviation law of Mexico, of 145 articles, grants facilities and encourages airlines and provides a system of competition subject to the moderating action of the State. The State grants concessions to air lines and supervises aircraft factories, without excluding foreign companies. The State approves the air carrier's schedule and operational organization, issues licenses, requires guarantees from promoters and compels the furnishing of mail services.⁷⁴ The General Communications Law of Mexico, by reference to the Commercial Code, makes the carrier liable as an insurer for loss or damage to baggage or cargo,⁷⁵ with a permissive limitation on the liability in regard to baggage.⁷⁶ Mexico, by legislation, charges the air carrier with liability to third parties for fault or negligence of the carrier, negligence being based on a failure to take "reasonable and technical measures indicated to avoid damage." By law, the air carrier, along with other transportation companies, must provide insurance for the passenger.⁷⁷

UNION OF SOVIET SOCIALIST REPUBLICS

All that is known of Soviet aviation law⁷⁸ is of the statutory provisions for the organization of the industry and of general liability provisions of code law. International obligations of the USSR are minimal. The USSR signed and ratified the Convention of Warsaw; signed but did not ratify the Convention against Precautionary Arrest (here, joining with the Pope — a rare occurrence); signed but did not ratify the Air Fuel Tax Convention and signed but did not ratify the International Civil Aviation Convention.

Soviet decrees just after the revolution made air transportation

⁷² Venezuela Civil Aviation Law. Article 44.

⁷³ This may be compared with the 125,000 franc limitation provided in the 1929 Warsaw Convention on the Liability of an Air Carrier in International Transportation.

⁷⁴ Mexico Laws of 12 July 1930, Article 41 (f).

⁷⁵ Ley de Vias Generales de Comunicacion, 10 September, 1932, Article 84.

⁷⁶ Ibid. Article 77.

⁷⁷ General Comunicacion Leyes of 1932, Article 134.

⁷⁸ See *Le Droit Aérien Soviétique* par M. Saporta. *Revue générale de l'air*. No. 2, 1952; 15:118-126. A discussion based on Russian air law of August 17, 1935.

subject to government ownership and control⁷⁹ although by special permit property may be held privately.⁸⁰

Civil aviation in the USSR began to be organized in 1922. In early 1923, with the participation of State, cooperative and public funds, there were formed such joint stock companies as the All Russian Voluntary Air Fleet Society, the Ukraina Air Communications Society, the Trans-Caucasian Society. In 1923, by decision of the Coun-

⁷⁹ Supra, 50. Vladimir Gsovski. *SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME*. University of Michigan Law School, 1948.

a. January 26, 1918, *R.S.F.S.R. Laws*, 1917-1918, text 290: "Merchant marine and private river craft and railways are declared in government ownership." Gsovski, page 11.

b. *Civil Code of 1922*, Section 6, extends government ownership to "land, subsoil, water, forest, mills, factories, mines, railroads, water and air transport, banks and means of communications . . . public utilities, and essential housing in cities and industrial centers." Gsovski, Vol. I, page 92.

c. *Civil Code of 1922*, Section 23, states that the things withdrawn from private commerce include arms, explosives, military equipment, aircraft, telegraph and radio-telegraph apparatus . . . radium, helium, spirits of higher proof than established by law, as well as quick-acting poisons. *Civil Code as amended* 16 October, 1924, *R.S.F.S.R. Laws*, text 785 and the 20 March, 1937 *R.S.F.S.R. Laws*, Text 19. Gsovski, Vol. II, page 47.

d. *Civil Code of 1924*, Section 22. Title to these government properties cannot be conveyed to private persons:

- (1) industrial, transport and other enterprises as a whole;
- (2) rolling stock of railroads, aircraft, seagoing vessels and river craft;
- (3) installations serving transportation by rail, water or air or public communications. Gsovski, Vol. I, page 559.

e. *Financial and Economic Legislation*. Insurance of the means of transportation belonging to the government or to private persons (cars, busses, street-cars, airplanes et cetera) is regulated by rule issued by the commissariat on 19 February, 1941.

f. *Constitution of the Mongol People's Republic*, Ulan-Bator, 30 June 1940. *Sovetskoe Gosudarstvo i Pravo*. Chapter I, Article 5. "All the land and its natural resources, the forests, the waters and all the wealth contained therein, the factories, mills, mines, gold production, the railroad, automobile, water and air transportation, means of communications, banks, mowing machine stations, and state enterprises are State property; that is, they belong to the people as a whole. Private ownership of the above is forbidden." 23 Washington Law Review 2 May, 1948.

⁸⁰ a. *Civil Code of 1922*, Sections 23 and 56 provided that properties held by special permit are authorized, but trading in them is prohibited; these included arms, precious metals and aircraft. Gsovski, Vol. I, page 340.

b. *Civil Code of 1924*, Section 53. Land, subsoil, forests, waters, railroads in public use and their rolling stock may be owned by the government only. Aircraft may be possessed and exploited by organizations and persons that have been granted such rights under the Air Code of the USSR. *R.S.F.S.R. Laws*, text 2, 1 August 1932. Gsovski, Vol. II, page 66.

c. 1 *Civil Law Textbook* 88; 1 *Civil Law* (1944) 167. A certain portion of government property assigned to quasi-corporations may not be transferred to private persons under any title whatsoever and is not subject to mortgage or execution for the benefit of creditors. (*Civil Code of 1924*, Section 22.) This applies to industries and commercial establishments, equipment and buildings, and installations of seagoing vessels and aircraft. Only cash and goods are practically at the free disposal of quasi-corporations and accessible to their creditors. Gsovski, Vol. I, page 383.

d. *Civil Code of 1922*, Section 23, as amended 1 August 1932. *R.S.F.S.R. Text* 301, provides that aircraft, aircraft motors and other aviation and air navigation equipment may be acquired:

- (1) by such institutions and enterprises of the socialized sector and public organizations as have been granted that right by the government of the USSR or the Main Office of the Civil Air Fleet;
- (2) by private persons with special permission of the Main Office of the Civil Air Fleet. Gsovski, Vol. II, page 48.

cil for Labor and Defense, supervision over the airlines was to be exercised by an Inspector of the Civil Air Fleet and a Council of Civil Aviation was to function under the Inspector. In 1930, jurisdiction over Civil Aviation in the USSR was placed in the All Union Association for the Civil Air Fleet, organized on the basis of soviet trusts and syndicates and directed entirely by the Chief of the Association. Supply for the Civil Air Fleet was under the management of the All Union Association for the Aircraft Industry, under the People's Commissariat of Heavy Industry. By a 1932 decree of the Council of the People's Commissaries, all civil aviation was put under control of the government of the Soviet Union and the Chief Administration of the Civil Air Fleet became the supervisor of departments of planes and economics, finances, technical and material supply, sanitation and inspection. A 1932 order of the Council of the People's Commissaries of the USSR charged the Chief Administration of the Civil Air Fleet with the problems of:

1. management and operation of the civil air fleet, regulation of safety and continuity in aerial communication, repair and supply;
2. planning and controlling the development of the Civil Air Fleet subject to government approval;
3. working out measures for reconstruction and rationalization of the operation of the Civil Air Fleet, scientific research in economy of techniques and study of foreign technical achievements and the encouragement of developments;
4. licensing of possession and use of airships; licensing of flights abroad for the USSR, and licensing of foreign civil airplanes;
5. technical inspection of aircraft and motors; organization of experimental and building of civil airplanes, motors, dirigibles, gliders and stratostates;
6. direction of training and distribution, use and inspection of Civil Air Fleet cadets;
7. assistance in the working out of international conventions for air navigation; establishing relations between USSR and foreign aeronautical undertakings and concluding treaties on international air communications.

The Civil Air Fleet also controls non-transport aeronautics used for the purposes of agricultural, rural, forest and sanitation projects, for the Red Cross and Red Crescent, for economic undertakings and public associations and individuals.⁸¹

Soviet aviation law is but a part of the whole system of the law of the USSR, which deserves some mention. Statutes in the USSR are promulgated, abrogated and amended only by the Supreme Soviet of the USSR, the highest manifestation of State authority.⁸² The Pre-

⁸¹ S. B. Kryloff of Leningrad. "Law Regulations Pertaining to the Organization of the Civil Air Fleet of the USSR." 6 Air Law Review 50 (1936).

⁸² Andrei Vyshinsky. *THE LAW OF THE SOVIET STATE* (1948), page 336, the USSR *Draft Constitution* of 10 September 1918 and 5 December 1936. Article 38. The right to initiate legislation belongs alike to the Soviet of the Union and to the Soviet of Nationalities equally . . . for consideration by the Supreme Soviet.

Article 40. The Presidium of the Supreme Soviet of the USSR is charged to watch that the law be correctly applied in conformity with the demands of life.

sidium of the Supreme Soviet of the USSR has no veto power with regard to laws adopted by the Supreme Soviet. Their statutes become operative without further action, although the Presidium publishes the law in various languages over the signatures of the President and Secretary of the Presidium of the Supreme Soviet of the USSR.⁸³ In the matter of judicial practices, the Presidium does not appoint judges; they are the "people's judges" and are considered independent and subject solely to the law, "chosen on the basis of universal, direct and equal suffrage by secret ballot and responsible only to their electors."⁸⁴ Courts of original jurisdiction, in civil matters, are concerned with controversies between state and social institutions and organizations.⁸⁵ In the field of international relations, the Council of the People's Commissars of the USSR is charged with guidance of foreign relations, with the general building up of the country's armed forces and defenses and with calling citizens for active military service.⁸⁶ The latter is an important factor; soviet civil aviation is closely linked to military air transport and in addition satellite airlines in Poland, Czechoslovakia, Hungary, Romania and Bulgaria are linked with Soviet Aeroflot network and are equipped with Soviet planes. The USSR Air Force is most transport conscious.

Although there exist certain most-favored-nation treaties⁸⁷ and commercial treaties,⁸⁸ regulations may preclude the operation of Foreign air carriers within the USSR.⁸⁹

⁸³ *Ibid.*, page 331.

⁸⁴ *Ibid.*, page 334. Article 109 and 112 of the 1936 Constitution.

⁸⁵ *Ibid.*, page 522. Article 5 of the 1936 Constitution. "There is one and the same court for all citizens, whatever their position as regards society, property or service and irrespective of the nationality and race to which they belong."

Ibid., page 517, Vyshinsky states "Without the public administration of justice, the Soviet court would be in no condition to fulfill one of its most important tasks: to be an 'instrument to inculcate discipline'—a task which Lenin called 'enormous'."

See, also, 23 Washington Law Review 2, May 1948. "However repressive the USSR legal system may appear to the 'reasonable man' of the United States tradition, the importance of the underlying conception of law as a teacher should not be minimized."

⁸⁶ *Supra*, 81, page 376 and 329. The second session of the Supreme Soviet adopted a Law Concerning the Order of Ratification and Denunciation of International Contracts of the USSR.

Article 2. Treaties of peace, of mutual defense from aggression and of mutual non-aggression, concluded by the USSR, are subject to ratification, as are international treaties wherein the respective parties have stipulated therefor.

Article 3. Denunciation of ratified international treaties is achieved on the basis of laws of the Presidium of the Supreme Soviet of the USSR.

⁸⁷ Gsovski, *supra*, 50, Vol. I, page 375. Section 12 of the 1939 Treaty with China and Section 8 of the 1940 Treaty with Iran grant to the Chinese and Iranian corporations most-favored-nation treatment in the exercise of their business activities in the territory of the USSR in keeping with conditions under which such activity is permitted by Soviet legislation. (Special license is required for a foreign corporation or a firm that is owned by a foreign individual.)

⁸⁸ *Supra*, 50. Commercial conventions with Great Britain, 1934, section 1; with Yugoslavia, 1940, section 13; with Bulgaria, 1940, section 20.

⁸⁹ a. *Supra*, 50, Vol. I, page 376. USSR Laws, Section 9. In their business, foreign firms are subject to all effective Soviet laws, decrees et cetera. Section 12. Where the activities of a foreign firm in Soviet territory are limited to negotiating and contracting individual transactions with the Soviet authorities in charge of foreign trade, without the nature of permanent commercial busi-

Specific legislation on aviation of the USSR Air Code of 1935⁹⁰ requires that crews of civil aircraft be Soviet citizens.⁹¹ The particularly unique feature of the soviet law of transportation arises from the fact that the government is the sole public carrier of consequence and that the bulk of the cargo is government property. All consignments are controlled.⁹² All shipping rates are established by the central or local government and overcharges lead to criminal punishment. Disputes involving overcharge are decided by the administration of the carrier concerned and are exempt from the jurisdiction of the courts and of arbitral tribunals settling disputes between governmental agencies.⁹³

Soviet jurists consider that passenger transportation and carriage of goods is based on a contract of the passenger or consignor with the carrier.⁹⁴

Soviet tort law probably applies to third party claims. The USSR has discarded the old principle of Roman law of *cujus commodum ejus periculum* — whoever derives profit from a particular activity must bear its disadvantages — perhaps considering it an untenable capitalistic theory that losses be equally distributed among all who derive benefit from a given activity.⁹⁵ Special rules have been enacted on the liability of air carriers, absolving the airlines only when the injury was caused by the “intent or gross negligence of the person injured” and apparently imposing the hazard of *vis major* on the airline.⁹⁶ Pre-revolutionary Russian law provided for liability for dam-

ness, foreign corporations and businessmen need no permit for admittance to do business in the USSR.

b. Peretersky and Krylov, 82. “Thus, if a representative of a foreign firm comes to the Soviet Union by invitation or permission from a Soviet organization in charge of foreign trade for negotiations or for contracting of an individual transaction, i.e., for a short period, in such case, the foreign firm does not have to obtain a permit to do business in Soviet Russia and register for admittance to commercial operations. Such cases do not involve permanent commercial activity . . . and consequently there is no need for a special permit. For the same reason, this provision of law cannot be considered as an exemption from the license system for foreign corporations established in the Soviet Union.”

⁹⁰ The 1929 Code of Maritime Navigation also requires Soviet citizenship for the captain and master and ship mechanics. *Supra*, 50, page 359(a).

⁹¹ Air Code of 1935. USSR Laws, 1935, text 359(a), Section 18. *Supra*, 50, page 362.

⁹² 1 Civil Law (1944) 112 et seq. *Supra*, 50, page 467.

⁹³ Maritime Code, Section 250. *Supra* 50, page 468.

⁹⁴ 2 Civil Law (1944) 129, 142, 149, 152. *Supra*, 50, page 468.

⁹⁵ Consider, in view of such concept, the comment that “the inevitable loss should be borne, not by the person upon whom it may happen to fall, but by the person who profits by the dangerous business to which the loss is incident.” Freund. *POLICE POWER* Chicago, 1904. Page 658.

⁹⁶ USSR Air Code, USSR Laws, 1935, text 359, Article 78. “An institution, enterprise, organization or person exploiting a civil aircraft, shall be liable under the laws of the Soviet Union and Soviet Republic to repair damages caused by death or bodily injuries to passengers at the start, flight and landing as well as damages caused by injuries to property or persons not carried by aircraft, unless it be proved that the injury occurred in consequence of intent or gross negligence of the person injured.” *Supra*, 50, page 508.

ages based on the fault of the wrongdoer.⁹⁷ By the Soviet Civil Code, a wrongdoer must compensate for injury⁹⁸ and those persons engaged in hazardous activities have an additional liability.⁹⁹ Therefore, the framers of the Soviet Code, with sympathy for the doctrine of causation, still follow the basing of liability on fault, and, without specifying carriers, introduced (in Section 404) a general concept of higher responsibility for "increased hazard" in the case of persons using such hazards. The enterprise of danger bears liability for damages whether it is to blame or not. Defenses for a holder of a source of increased hazard are more restricted than those permitted in the cases of other types of injury (governed by Section 403) and are only proof of intent or gross negligence on the part of the person injured or *force majeure*. To establish the impossible-to-prevent-event, the court should consider what is the contemporary condition of technical and economic progress and that an "irresistible force" is one that cannot be prevented, not by a given person alone, but by society in general.¹⁰⁰ Damages, as expressed in the code, imply reparations and compensation is based on the principle of social insurance. Assignment of claims of consignors and consignees for damages from the carrier is prohibited in Soviet Law.¹⁰¹

It is to be noted that under Imperial Russian law, there was a responsibility in the State for the actions of officials.¹⁰² Under the law of the USSR, with governmental operation of transportation facilities, the institution is liable for injury caused by improper official acts.¹⁰³

⁹⁷ USSR Code of Civil Laws, Vol. X. Part I of Svod Zakonov. *General Code of Laws*, 1851 statutes, Section 647. "No compensation shall be made for injury or damage arising from any accidental act, committed not only without any intent, but also without any negligence whatsoever on the part of the one who committed it."

Section 648. "Anyone is liable to compensate for injury and damages caused to another by his act or omission, even though such act or omission does not constitute a crime or minor offense, if it is proved that his conduct was not compelled by a command of law or government, by self-defense, or by the coincidence of circumstances which he could not prevent." *Supra*, 50 page 494.

⁹⁸ Soviet Civil Code, Section 403. "Anyone causing injury to the person or property of another must repair the injury caused. He is relieved from liability if he proves that he could not prevent the injury or that he was privileged to cause the injury, or that the injury arose as a result of the intent or gross negligence of the person injured."

⁹⁹ Soviet Civil Code, Section 404. "Individuals and enterprises whose activities involve increased hazards for persons coming into contact with them, such as railways, teamways, industrial establishments, dealers in inflammable materials, keepers of wild animals, persons erecting buildings and other structures and the like, shall be liable for the injury caused by the source of increased hazard, if they do not prove that the injury was the result of *force majeure* or occurred through the intent or gross negligence of the person injured."

¹⁰⁰ 1 Civil Law (1944) 340. *Supra*, 50, page 505.

¹⁰¹ 2 Civil Law (1944) 114. *Supra*, 50, page 468.

¹⁰² Under Imperial law, the treasury is responsible for damages caused by officials while acting in discharge of their official duties. Sections 684 and 687 of Civil Laws, Svod Zakonov, Vol. X, Part I (1906-1914 ed.) as interpreted by the Ruling Senate, General Assembly, Decision Number 52 of 1892; Civil Division, Decision Number 490, of 1878; Number 69 of 1889; Number 56 of 1900.

¹⁰³ R.S.F.S.R. Laws (6 April 1928) Text 355. Section 407. "An institution shall be liable for injury caused by improper acts of an official thereof committed in performance of his duties but only in cases specifically prescribed by law, provided that the improper nature of the acts of the official is recognized

As written, the law of the Soviet Union does not differ excessively from that of civil law jurisdictions, although practical application may not follow the written law.¹⁰⁴

CONCLUSION

At best, such a summary shows that the variations in national laws of civil and common law countries are not so diverse as to preclude comprehension or cooperation among nations. In the world of aviation, legal concepts follow the rapid technological advances. To maintain progressive thinking, one should remember the comment of Cardozo in 1937 that:

"We live in a world of change. If a body of laws were in existence adequate for the law of today, it could not meet the demands of the civilization of tomorrow. Society is inconsistent. So long as it is inconsistent, and to the extent of such inconsistency, there can be no constancy in law."

In Air Law, as in no other branch of jurisprudence, we must,

"Never lose sight of the present reality and have a penetrating insight into the future. To limit oneself to a present-day viewpoint is to accomplish a work of short duration."¹⁰⁵

as such by a competent judicial or administrative authority. The institution shall be absolved from liability if the person fails to file an appeal from the improper act in due time. The institution shall have the right, in turn, to deduct from the wages of the official, to the extent of the compensation paid to the injured person."

Section 407(a). "An institution shall be liable for the acts of its officials committed within their jurisdiction and for their omission in the performance of their duties, found to be improper, illegal or criminal by a proper judicial or administrative authority, in cases where the person injured has deposited property (in particular, sums of money) with the institution or with the official in compliance with a legal duty or a judicial decision, sentence or order. An institution is liable on the same grounds in cases where the property was deposited for the benefit of the injured person."

¹⁰⁴ *Supra*, 50, page 50. Gsovski mentions that under the USSR Criminal Code, an innocent person may be penalized. Section 1(3) of Federal Code of Political Crimes (section 581c of R.S.F.S.R. Criminal Code) 8 June, 1934, if a man in military service takes flight abroad by air or otherwise in peace as well as in wartime, the adult members of his family who had knowledge of his plans are subject to imprisonment for from 5 to 10 years, plus confiscation of property, but those who had no such knowledge, though living with him or dependent upon him are subject to exile to remote localities of Siberia for five years. (There is, then, no causal connection between acts of relatives and damage—a condition of tort liability under the USSR Civil Code.)

¹⁰⁵ Francesco Cosentini. "Air Law and Comparative Law." 7 *Tulane Law Review* 13.